Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

No. 76-1015

JOHN HUGHETT, JR.
WARD HUGHETT and
THOMAS HUGHETT - - - - - Petitioners

versus

UNITED STATES OF AMERICA - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners, John Hughett, Jr., Ward Hughett and Thomas Hughett, respectfully pray that a Writ of Certiorari issue to review the judgment and order of the United States Court of Appeals for the Sixth Circuit decided December 23, 1976.

OPINION BELOW

The opinion of the jury verdict is unreported and is set forth in the Appendix "B", page 15, herein.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was decided and filed on December 23, 1976, and has not yet been reported. This petition for a Writ of Certiorari is filed within thirty (30) days of that date. Jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

(1) Whether such language as

> ". . . so, unless the evidence in the case leads the jury to a different or contrary conclusion . . . unless otherwise instructed in determining the issue as to intent, . . . It is not necessary for the prosecution to prove knowledge of the accused, that a particular act or failure to act is a violation of the law. Unless and until outweighed by evidence in the case to the contrary, the presumption is that every person knows what the law forbids and what the law requires to be done. . . ."

shifts the burden of proof from the prosecution to defendants to prove their innocence in crimes requiring willfulness and intent?

(2) May persons shown by the evidence not to have an interest in a gambling operation, nor performed any function necessary to such an operation, be included to establish five or more persons necessary to permit the assertion of federal jurisdiction under Title 18, §1955?

CONSTITUTIONAL AND STATUTORY PROVISIONS PROVIDED

The statutes which are invoked here are: 26 U.S.C. §5121(2), which is a special statutory tax placed on retail liquor dealers, and 18 U.S.C. §1955, *et seq.*, which is a part of the "Organized Crime Control Act of 1970," which prohibits the existence of a "gambling business" that "involves five or more persons who conduct, finance, manage, supervise, direct or own all or part of such business," and that "has been or remains in substantially continuous operation for a period of thirty days or has a gross revenue of $2,000 in any single day." These statutes are printed in Appendix "C", *infra*, page 16.

The provision of the constitutional provision involved is Amendment Five to the United States Constitution, which guarantees "no person shall be deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

The Petitioner, Ward Hughett, was convicted of willful failure to pay the special tax as required by Title 26, Section 5121(2), of the United States Code imposed on retail liquor dealers. Petitioner, Thomas Hughett, was convicted of willfully conducting an illegal gambling business in violation of Title 18, Section 1955, of the United States Code. Petitioner, John Hughett, Jr., was convicted of willful failure to pay the special tax as required by Title 26, Section 5121(2),

of the United States Code imposed on a retail liquor dealer and willfully conducting an illegal gambling business in violation of Title 18, Section 1955, of the United States Code.

A jury trial began in District Court on January 7, 1976, on the consolidated cases involving a failure to pay the tax imposed upon a retail liquor dealer and conducting an illegal gambling business, and a jury returned a verdict against each defendant-appellant on each and every charge against them. The defendants-appellants, John Hughett, Jr. and Ward Hughett, were committed to the custody of the Attorney General of the United States for a period of two years on the charge of willful failure to pay the special tax imposed on a retail liquor dealer. The defendants-appellants, John Hughett, Jr. and Thomas Hughett, were committed to the custody of the Attorney General of the United States for a period of two years on the charge of conducting an illegal gambling business. The sentence imposed on John Hughett, Jr., for willful failure to pay the special tax imposed on a retail liquor dealer was ordered to be served concurrently with the sentence imposed in conducting an illegal gambling business.

Thereafter, defendants-appellants perfected an appeal with the United States Court of Appeals for the Sixth Circuit on both charges consisting of a failure to purchase a retail liquor license and conducting an illegal gambling business. The Sixth Circuit, in a per curiam order, affirmed the District Court. A copy of such Order is attached hereto as Appendix "A". It is from this Order that a review is sought.

REASONS FOR GRANTING THE WRIT

(1) The Sixth Circuit has decided an important question of a federal charge to a jury which is in direct conflict with a decision of another court of appeals on the same or similar charge as to which federal courts can exercise independent judgments and this decision is likely to have continuing future consequences.

The reason for this Court granting the Writ is pointed out in the Per Curiam Order of the Sixth Circuit, wherein:

> "As this court has previously stated, it is error to instruct a jury about inferences to prove intent by stating '. . . unless the evidence in the case leads the jury to a different or contrary conclusion, the jury may draw the inference and find that the accused intended all the natural and probable consequences which one, standing in like circumstances and possessing like knowledge, should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused.' See e.g., *United States* v. *Denton,* 336 F. 2d 785 (6th Cir., 1964); *United States* v. *Releford,* 352 F. 2d 36 (6th Cir., 1965)."

The Sixth Circuit has recognized such a charge "is error" in the instant case and cites previous decisions of the Sixth Circuit wherein such a charge was characterized as "clumsy, inartistic . . . and, if taken alone, confusing," *supra.* However, in practice, the Sixth Circuit has refused to find such charges plain error on the basis that other so-called curative provisions were contained in the overall charge. Further,

these decisions cited by the Sixth Circuit make it abundantly clear that the Court was aware of the dilemma it was creating between Circuits because in the decisions cited similar charges had been vigorously criticized and found to be error by the Fifth Circuit in *Mann* v. *United States,* 319 F. 2d 404 (C.A. 5, 1964), cert. denied 375 U. S. 986, 84 S. Ct. 520, 11 L. Ed. 2d 474 (1964).

Thus, there is present a conflict between the Circuit Courts of Appeal. The Fifth Circuit, by decision, has held in *Mann, supra,* similar charges to have been erroneous as to the accused presumption of innocence because such a charge shifted the burden of proof to defendant to prove lack of intent. Likewise, the Ninth Circuit found a similar charge to be "plain error" with regard to a criminal offense wherein specific intent is an essential element. *Bloch* v. *United States,* 221 F. 2d 786 (C.A. 9, 1955). Thus, the Fifth and Ninth Circuits, by practice, have found such charges plain error on intent and not cured by an accurate charge on necessity of intent and burden of proof; the Sixth Circuit, while finding such charge erroneous, has steadfastly found such an erroneous charge cured by the overall instructions. *United States* v. *Denton,* 336 F. 2d 785 (C.A. 6, 1964); *United States* v. *Releford,* 352 F. 2d 36 (C.A. 6, 1965).

The mere conflict among various Circuit Courts of Appeal as to curative provisions for similar erroneous charges is evidence of a need to solve conflicting interpretations surrounding such charges in order to solve continuing future conflicts among the various Circuits.

For a complete statement of the Court's complete charge in the instant case, see "Appendix "D". For a concise statement of prejudicial errors in the instant charge, see Appendix "D", at pages 24-25.

It is necessary that this conflict be settled by this Court in order that there might be uniformity of practice and decisions in the Federal Courts as to whether such a charge can be given in a criminal offense when specific intent is an essential element, and, if so, what curative provisions, if any, are necessary to prevent such a charge being erroneous.

Petitioners submit all decisions have been critical of such language and most have found such charge error. However, at least one jurisdiction, the Sixth Circuit, while claiming such charge to be erroneous has relied on undefined curative language to exercise such error from being prejudicial under the whole instruction. The time is ripe for the Supreme Court to find such charges as to specific intent to be absolutely prejudicial error, or offer some established criterion or definition as to what curative language is necessary to avoid prejudicial error.[1]

---

[1]The Sixth Circuit makes much of the fact that "the record reveals that no objection was made to this instruction and considering the instruction as a whole . . . we conclude that this error did not affect any substantial right of defendants." Appendix "A", pages 13-14. Such a conclusion was of substantial prejudice to defendants-appellants, and previous decisions along with Rule 52(b) of the Federal Rules of Criminal Procedure, and cases decided thereunder requires no such objection. It is submitted precise objections to a 26-page oral instruction on every erroneous charge in the instant case was impossible. Furthermore, an attempt at any such objection was cut short by the trial judge when defendants-appellants objected to the charge, but the Judge insisted there were

(Footnote continued on following page)

(2) Further, it is necessary for this Court to grant this Writ to define an important question of statutory construction of federal law which has not been, but should be, decided by this Court.

The language of Title 18, Section 1955, clearly prohibits the existence of a "gambling business" that "involves five or more persons who conduct, finance, manage, supervise, direct or own all or part of such business," and that "has been or remains in substantially continuous operation for a period of thirty days or has a gross revenue of $2,000 in any single day."

The cases construing Section 1955 are uniform in declaring that Congress intended even for "street level employees" to be included in the jurisdictional five. See *United States* v. *Box,* 530 F. 2d 1259, 1264; *United States* v. *Marrifield,* 5 Cir., 1975, 515 F. 2d 877, 880; *United States* v. *Sacco,* 9 Cir., 1974, 491 F. 2d 995 (en banc); *United States* v. *Becker,* 2 Cir., 1972, 461

(Footnote continued from preceding page)
no errors in the overall charge. Appendix "D", pages 30-31. As stated in *Bloch* v. *United States,* 221 F. 2d 786 at 788:

> " 'Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.'
>
> "The Supreme Court of the United States in U. S. v. Atkinson, 297 U. S. 157, 56 S. Ct. 391, 392, 80 L. Ed. 555, concerning this matter, said:
>
> 'In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.'
>
> "See also Morris v. United States, 9 Cir., 156 F. 2d 525, 169 A. L. R. 305; U. S. v. Balodimas, 7 Cir., 177 F. 2d 485; U. S. v. Perplies, 7 Cir., 165 F. 2d 874; Fischer v. U. S., 10 Cir., 212 F. 2d 441, 444."

F. 2d 230, 232; *United States* v. *Jones,* 9 Cir., 1974, 491 F. 2d 1382, 1384.

Further, we can reach a conclusion from these and other Section 1955 cases as stated in *United States* v. *Joseph,* 5 Cir., 1975, 519 F. 2d 1068, 1071, that a person who performs a function necessary in the operation of a gambling enterprise makes the person so performing one of the jurisdictional five.

Returning to the facts of this case, the failure of the Sixth Circuit to identify those persons who performed and describe their necessary function in the operation of a gambling business within the purview of the above cases places this Circuit squarely in conflict with the above Circuits. This conflict is not minimized or reconciled by the bold but simple assertion by the Sixth Circuit in the instant case that:

> "An examination of the record on appeal reveals ample evidence to support the conviction of violation of 18 U.S.C. §1955, and the verdict of the jury crediting that evidence should not be disturbed." Appendix "A", pages 13-14.

Such a failure by the Sixth Circuit to identify the five persons and describe their "necessary function" to the gambling operation in the instant case takes on an added relevancy when a direct challenge is made on appeal to the identity of such persons and their functions necessary to confer jurisdiction under the Federal statute. The failure of the Sixth Circuit to identify these five persons and point out their "necessary function" places this circuit in conflict with those

other circuits which have identified and described the necessary functions of such five persons necessary to confer federal jurisdiction.

CONCLUSION

The Sixth Circuit has substituted an admittedly erroneous charge as to specific intent in a criminal case for the statutory requirement of specific intent in derogation of other courts of appeals.

Petitioners submit that it is necessary for this Court to review the decision of the Sixth Circuit to settle this conflict between the Circuit Courts in order that there might be uniformity of practice and decision in the Federal Courts which will prohibit erroneous charges as to specific intent being substituted for such a statutory requirement in criminal cases. The Fifth and Ninth Circuits by decision have so held. The Sixth Circuit while recognizing such error in its dictum has by decision placed itself squarely in conflict with the Fifth and Ninth Circuits.

Further, the Sixth Circuit in the instant decision has ignored Petitioners' right to challenge the identity of the jurisdictional number necessary to establish jurisdiction in the instant case, as well as require a showing of their necessary function in the operation of a gambling business within the purview of the Federal Statute. The result of which is to place the Sixth Circuit in conflict with the Second, Fifth and Ninth Circuits.

Petitioners submit that it is necessary for this Court to review the decision of the Sixth Circuit to insure uniformity of practice and decisions in the Federal Courts as to whether the accused can challenge the identity of five or more persons and to establish working criterion to determine the minimum necessary functions required to operate a gambling business as required under the Federal statute.

Respectfully submitted,

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Attorney for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Petition for Writ of Certiorari has been served upon the United States by mailing a true copy hereof, first class, postage prepaid, to the Solicitor General, Department of Justice, Washington, D. C. 20530; and a true copy to Honorable James F. Cook, Assistant United States Attorney, Eastern District of Kentucky, Post Office Building, Lexington, Kentucky 40501, on this the _____ day of January, 1977.

THOMAS J. ROBERTS

APPENDIX

APPENDIX "A"

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 76-1919

UNITED STATES OF AMERICA, - - *Plaintiff-Appellee*

v.

JOHN HUGHETT, JR., WARD HUGHETT, THOMAS HUGHETT, - - *Defendants-Appellants*

ORDER—Filed December 23, 1976

BEFORE: EDWARDS, McCREE, and LIVELY, Circuit Judges.

This appeal from conviction of willful failure to pay an excise tax imposed by 26 U.S.C. § 5121(a) in violation of 26 U.S.C. § 5691(a), and of violation of 18 U.S.C. § 1955, presents two issues: (1) whether the evidence sufficed to support the conviction of a violation of 18 U.S.C. § 1955, and (2) whether the district court erred in its instructions about presumption of innocence, burden of proof, and specific intent by shifting the burden of proof from the prosecution to the defendants.

An examination of the record on appeal reveals ample evidence to support the conviction of violation of 18 U.S.C. § 1955, and the verdict of the jury crediting that evidence should not be disturbed.

As this court has previously stated, it is error to instruct a jury about inferences to prove intent by stating ". . . un-

less the evidence in the case leads the jury to a different or contrary conclusion, the jury may draw the inference and find that the accused intended all the natural and probable consequences which one, standing in like circumstances and possessing like knowledge, should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused." See e.g., *United States* v. *Denton*, 336 F. 2d 785 (6th Cir. 1964); *United States* v. *Releford*, 352 F. 2d 36 (6th Cir. 1965).

Nevertheless, we observe that the record reveals that no objection was made to this instruction and considering the instruction as a whole, in the light of the proofs of guilt, we conclude that the error did not affect any substantial right of defendants. For the foregoing reasons, the judgment is AFFIRMED.

Entered by order of the court
(s) JOHN P. HEHMAN
Clerk

APPENDIX "B"

JURY VERDICT AT DISTRICT COURT

By the Court: Would you hand the verdict to the Clerk please? The Clerk will please read the verdict and let there be no demonstrations when the verdict is read.

By the Clerk: Indictment No. 74-4: We the jury find as to the defendant John Hughett, Jr., guilty. We the jury find as to the defendant Ward Hughett, guilty. Signed Oscar Jones, Foreman. Indictment No. 74-39: We the jury find as to the defendant John Hughett, Jr., guilty. We the jury find as to the defendant Thomas Hughett, guilty. We the jury find as to the defendant Sedla Sue Blackburn, guilty. We the jury find as to the defendant Bonnie Hughett, guilty. Singed Oscar Jones, Foreman.

By the Court: Is that your verdict, members of the jury?

Jurors: Yes, sir.

APPENDIX "C"

CONSTITUTIONAL AND STATUTORY PROVISIONS

1955. Prohibition of illegal gambling businesses.—(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

* * * * * * * *

5121. Imposition and Rate of Tax.

(a) Retail dealers in liquors.—

(1) General.—Except as provided in subsection (c), every retail dealer in liquors shall pay a special tax of $50 a year.

* * * * * * * *

APPENDIX "D"

OVERALL CHARGE TO JURY IN DISTRICT COURT

By the Court: Members of the jury, at this time it becomes the obligation of the Judge of the Court to instruct the jury as to the law of the case. In the Federal Courts it is the right, the privilege and sometimes the duty of the presiding Judge of the Court to comment upon the evidence. I do not know that I shall do that in this particular case to any appreciable extent or at all but if I should, you are not to consider what I may say as being all of the evidence, the most important evidence or the most significant evidence upon any given point. You, the jury, are the sole tryers of the facts. These defendants and each of them are presumed innocent. That presumption starts with the defendant, continues with him throughout the trial of the case and extends to every facet of the case. Before the defendants, or any of them, in either of these two consolidated cases may be found guilty. The guilt of that defendant must be established beyond a reasonable doubt as to the charge contained in that indictment. The term 'reasonable doubt' means just what the words imply, a reasonable doubt is not some fleeting or inconsequential doubt. It is a doubt based upon reason. The United States is required to prove its case beyond a reasonable doubt. It is not required to prove its case beyond all doubt. Very few matters are capable of proof to an absolute certainty. The charge in this case is contained in the indictment in two separate cases which have been consolidated for purposes of trial. The indictment in No. 74-4 is against John Hughett, Jr., and Ward Hughett and it charges as follows: That from on or about the 26th day of October, 1973, and continuing until on or about the 14th day of December, 1973, at Middlesboro, Bell County,

in the Eastern District of Kentucky, John Hughett, Jr., and Ward Hughett carried on the business of a retail dealer in liquors and willfully failed to pay their special tax as required by Title 26 Section 5121 (a) United States Code. As to that charge the question for the consideration of the jury is the question of the guilt or innocence of the defendants John Hughett, Jr. and Ward Hughett upon the charge contained in that indictment which has been referred here during some of the evidence and some of the arguments as the liquor indictment.

In No. 74-39 against John Hughett, Jr., Granville Capps, Thomas Hughett, Selda Sue Blackburn and Bonnie Hughett, during the trial of this case a charge was dismissed as to the defendant Granville Capps. The defendants, John Hughett, Jr., Thomas Hughett, Selda Sue Blackburn and Bonnie Hughett, are on trial in the case No. 74-39 which has been consolidated with No. 74-4 for the purposes of trial. And in that case the indictment reads as follows: The Grand Jury charges beginning on or about the 26th day of October, 1973, and continuously thereafter up to and including the 14th day of December, 1973, in Middlesboro, Bell County, in the Eastern District of Kentucky, John Hughett, Jr., Granville Capps, Thomas Hughett, Selda Sue Blackburn and Bonnie Hughett, with diverse other persons to the Grand Jury unknown, unlawfully, willfully and knowingly did conduct an illegal gambling business under the name of the Green Parrot, which business involved lotteries, card games of blackjack, card games of poker and tip boards and which illegal gambling business had been in substantially continuous operation for a period in excess of thirty days involving five or more persons in its conduct, management and ownership and all being in violation of the laws of the Commonwealth of Kentucky; that is, KRS 436.200, 436.230 and 436.440. The question for the consideration of the jury in case No. 74-39 is the question of the guilt or innocence

of the defendants John Hughett, Jr., Thomas Hughett, Selda Sue Blackburn and Bonnie Hughett, on the charge contained in that indictment which has been referred to here at various times during the course of this trial as the gambling indictment. In this connection the Court will give you the following specific instructions. As to the charge contained in indictment No. 74-4, which has been referred to as the liquor indictment, you are instructed as follows:

26 U. S. Code Section 5691(a) provided, in part, as follows: (a) Any person who shall carry on the business of a brewer, rectifier, wholesale dealer in liquors, retail dealer in liquors, wholesale dealer in beer, retail dealer in beer, limited retail dealer, or manufacturer of stills, and willfully fail to pay the special tax as required by law, shall be guilty of an offense against the United States. 26 United States Code Section 5121(a) provides in part as follows: "Every retail dealer in liquors shall pay a special tax of $54 a year." As used in the foregoing statutes and in the indictment herein, the term Retail Dealer in Liquors means any dealer who sells or offers for sale, any distilled spirits, wines or beer to any person other than a dealer. An act is done willfully if done voluntarily and intentionally and with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law. You are further instructed that Ward Hughett, who was indicted in Case No. 74-4 and charged with the offense of carrying on the business of a retail dealer in liquors who willfully failed to pay the tax therefor as required by law. Evidence has been introduced in this case as to certain alleged activities of Mr. Ward Hughett relating to the alleged operation of certain gambling activities on the premises described as the Green Parrot. This evidence was admitted because of the apparent intertwining of the alleged circumstances relating to the operation of the Green Parrot and it was impossible to separate these various

alleged activities of Mr. Ward Hughett into specific compartments relating to the two specific indictments for which the respective defendants are on trial herein. However, you are admonished that any evidence tending to show that Mr. Ward Hughett may have committed certain gambling activities should not in any way be considered by you as evidence of his guilt upon the charge contained in indictment No. 74-4 relating to the alleged unlawful sale of alcoholic beverages; provided, however, that such evidence may be considered by you for the purpose of showing the extent, if any, to which the defendant Ward Hughett, exercised dominion or control over the alleged alcoholic beverages sales conducted at the Green Parrot.

As to the charge contained in indictment No. 74-39, the gambling indictment, you are instructed as follows:

18 United States Code Section 1955 provides in part as follows: (a) Whoever conducts, finances, manages, supervises, directs or owns all or part of an illegal gambling business shall be guilty of an offense against the United States. As used in this section "illegal gambling business" means a gambling business which is a violation of the law of a state or political subdivision in which it is conducted, (2) involves five or more persons who conduct, finance, manage, supervise, direct or own all or part of such business; and (3) has been or remains in substantially continuous operation for a period in excess of thirty days. "Gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein. "State" means any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico and any territory or possession of the United States. The operation of the card games known as "blackjack" and "poker" for money and the selling of tip boards for money is and was at all times mentioned in the

indictment herein a violation of the gambling laws of the Commonwealth of Kentucky, which are set out in indictment No. 74-39 and referred to as KRS, or Kentucky Revised Statutes 436.200, 436.230 and 436.440. You will note from what I have said that the three essential elements of the alleged offense charged in this so-called gambling indictment are: 1. That the so-called gambling business must be: (a) in violation of the law of the State of Kentucky, and (b) involve the same five or more persons in the conduct, financing, management, supervision, direction or ownership of such business for the period of time hereinafter set out and (c) have been or remain in operation for a substantial continuous period of thirty days. The three requirements hereinbefore set out are necessary in order to establish Federal jurisdiction. Once Federal jurisdiction has been established, then the evidence is sufficient to convict if the evidence shows beyond a reasonable doubt that any person or persons charged conducted, financed, managed, supervised, directed or owned all or part of the alleged illegal gambling business for any period of time.

The word 'conduct' as hereinbefore used refers to both 'high level bosses' and 'street level employees'; that is to say it was the intent of Congress in enacting the foregoing statute to include all those who conduct, finance, manage, supervise, direct or own all or part of a gambling operation regardless of how minor their roles and whether or not they are labeled 'agents, runners, watchmen, independent contractors, or clerks' and to exclude only customers of the business.

It would appear that there can be no dispute that the gambling operation allegedly carried on on the premises of the Green Parrot Restaurant in Middlesboro, Kentucky, during the periods outlined in the indictment was, if it occurred, a violation of the laws of the State of Kentucky. There is a dispute as to whether five or more persons were

involved in said operation as required by Federal statute and there is a dispute as to whether same remained in substantially continuous operation for more than thirty days, and as to the part, if any, which any of the defendants played in the conduct or operation of the said alleged business, if they did play any such part. You are further instructed that as the indictment charges five persons with the alleged gambling activity described therein and 'diverse other persons', the composition of said alleged group of five persons may consist of a group of any five persons, which may include all, any one or none of the named persons in the indictments, so long as you believe beyond a reasonable doubt that the same five or more persons were involved in the conduct, management, supervision, direction or ownership of all or part of such business for the initial thirty day period required by the Federal statute. Once the existence of said initial group of five persons has been established and the conduct, management, supervision, direction or ownership of all or part of such business for the requisite initial thirty day period, then any person thereafter joining said operation and playing any role in the conduct, management, supervision, direction and ownership of all or part of such business may be found guilty, if you believe beyond a reasonable doubt that such person played such a role. You will further note that the statute requires that the business be engaged in substantial continuous operation for a period exceeding thirty days. This is not to say that said alleged business must have operated 24 hours a day seven days a week for more than thirty days. The word 'substantial' as used in the foregoing statute is to be given its usual and customary meaning in the English language; that is, being that specified to a large degree or in the main. 'Unlawfully' means contrary to law. So, to act unlawfully means to do willfully something which is contrary to law. As stated before, an act is done willfully if done voluntarily and in-

tentionally and with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law. An act is done 'knowingly' if done voluntarily and intentionally and not because of mistake or accident or other innocent reason. The purpose of adding the word 'knowingly' was to insure that no one would be convicted for an act done because of mistake, or accident or other innocent reason.

As to the charges contained in both indictment No. 74-4 and No. 74-39, you are further instructed as follows: An accomplice is one who united with another in the commission of an alleged crime, voluntarily and with common intent. An accomplice does not become incompetent as a witness because of participation in the crime charged. On the contrary, the testimony of an accomplice alone, if believed by the jury, may be of sufficient weight to sustain a verdict of guilty, even though not corroborated or supported by other evidence. However, the jury should keep in mind that such testimony is always to be received with caution and weighed with great care. You should never convict a defendant upon the unsupported testimony of an alleged accomplice, unless you believe that unsupported testimony beyond a reasonable doubt.

A defendant may be proven guilty by either direct or circumstantial evidence. Direct evidence is the testimony of one who asserts actual knowledge of a fact, such as an eye witness; circumstantial evidence is proof of a chain of facts and circumstances indicating the guilt or innocence of a defendant. The law makes no distinction between the weight to be given to either direct or circumstantial evidence; it requires only that the jury, after weighing all the evidence, must be convinced of the guilt of a defendant beyond a reasonable doubt before he can be convicted. You are further instructed that the punishment provided by law for the offenses charged in the respective indictments

is a matter exclusively within the province of the Court, and should never be considered by the jury in any way in arriving at an impartial verdict as to the guilt or innocence of the accused. It is the duty of the attorneys on each side of a case to object when the other side offers testimony or other evidence which the attorney believes is not properly admissible. Upon allowing testimony or other evidence to be introduced over the objection of an attorney, the Court does not, unless expressly stated, indicate any opinion as to the weight or effect of such evidence. As stated before, the jurors are the sole judges of the credibility of all witnesses and the weight and effect of all evidence. When the Court has sustained an objection to a question, addressed to a witness, the jury must disregard the question entirely, and may draw no inference from the wording of it, or speculate as to what the witness would have said if permitted to answer any question. It is the duty of the Court to admonish an attorney who, out of zeal for his cause, does something which is not in keeping with the rules of evidence or procedure. You are to draw no inference against any side to whom an admonition of the Court may have been addressed during the trial of this case. You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the indictments and the denial made by the "not guilty" pleas of the defendants. You are to perform this duty without bias or prejudice as to any party. The law does not permit jurors to be governed by sympathy, prejudice or public opinion. Both the accused and the public expect that you will carefully and impartially consider all the evidence in the case, follow the law as stated by the Court and reach a just verdict, regardless of the consequences. *Intent may be proved by circumstantial evidence. Indeed, it can rarely be established by any other means. While witnesses may see and hear and so be able to give direct evidence of what a defendant does*

or fails to do, of course there can be no eye witness account of the state of mind with which the acts were done or omitted. But what a defendant does, or fails to do, may indicate intent, or lack of intent to commit the offense charged. As a general rule, it is reasonable to infer that a person ordinarily intends all the natural and probably (sic) consequences of acts knowingly done or knowingly omitted. So, unless the evidence in the case leads the jury to a different or contrary conclusion, the jury may draw the inference and find that the accused intended all the natural and probable consequences which one, standing in like circumstances and possessing like knowledge, should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused. Unless otherwise instructed, in determining the issue as to intent, the jury is entitled to consider any statements made and acts done or omitted by the accused, and all facts and circumstances in evidence in the case which may aid determination of state of mind. It is not necessary for the prosecution to prove knowledge of the accused that a particular act or failure to act is a violation of the law. Unless and until outweighed by evidence in the case to the contrary, the presumption is that every person knows what the law forbids and what the law requires to be done. However, evidence that the accused acted or failed to act because of ignorance of the law is to be considered by the jury in determining whether or not the accused acted or failed to act with specific intent, as charged. (Emphasis added.)

Now, members of the jury, if that sounds complicated it's really not. It's very simple. It has taken some considerable period of time to try this case or these two consolidated cases but basically they are very simple. No. 74-4 charges John Hughett, Jr., and Ward Hughett with carrying on the business of a retail dealer in liquors and willfully failing to pay the special tax as required by Title 26 Section

5121A, United States Code. They are charged with selling liquor without a license. It just boils down to that. Count 2 charges the defendants—I mean indictment No. 2, 74-39, the gambling indictment charges John Hughett, Jr., Thomas Hughett, Selda Sue Blackburn and Bonnie Hughett as it now stands, and diverse other persons to the Grand Jury unknown with unlawfully, willfully and knowingly conducted an illegal gambling business, as it has been described here and charged in the indictment in violation of the laws of the Commonwealth of Kentucky. As to the liquor indictment defense counsel conceded and it appears from their arguments and evidence has been most abundant that liquor was being sold on the premises of the Green Parrot in Middlesboro, Kentucky, on or during the period embraced within the term of the charge of this indictment. There was no dispute, it appears, that the defendant did not have a liquor—Federal liquor license to sell liquor or those premises. The only defense that is interposed there is they say they didn't it was against the law to sell it without a license. That's a question for the jury as to whether you believe that the evidence proves these two defendants, John Hughett and Ward Hughett, guilty of the offense charged in indictment No. 74-4, the so-called liquor indictment. No. 74-39 is the gambling indictment, slightly more complicated. Again, defense counsel appears to concede that certain gambling activities were being conducted there by some parties but they allege that there was not the requisite substantial thirty day period of conduct of such gambling operations by five or more persons which was necessary to confer Federal jurisdiction and further it is disputed as to the various roles, if any, carried on by these defendants, John Hughett, Jr., Thomas Hughett, Selda Sue Blackburn and Bonnie Hughett. The defense contends that they—that the Government has not proven the statutory pre-requisite for a charge of this character and further has not proven that

these defendants carried on the operation. It would appear there could be no dispute about that because the defense counsel concede that playing poker for money and also running a blackjack table and selling tip boards are against the law and the Court has instructed you that they are against state law. The question is, does the case rise to the magnitude of a Federal violation because of the prerequisite of the association, the conduct by five or more persons for a substantial period of 30 days. If that fact has been proven, then it becomes a question whether these defendants either participated during that 30 days or participated thereafter. That is necessary in order to establish the jurisdiction. The United States contends from all the evidence which has been introduced here, direct and circumstantial and the reasonable inferences which may be drawn therefrom, that it has proven in No.—guilt of the defendants John Hughett, Jr., and Ward Hughett in No. 74-4 and has proven the guilt of the defendants John Hughett, Jr., Thomas Hughett, Selda Sue Blackburn and Bonnie Hughett in No. 74-39. Defendants on the other hand contend that the Government has failed in its proof in No. 74-4 in that it has failed to show that it was a willful failure to pay the tax and interposed the defense that these defendants, John Hughett, Jr. and Ward Hughett, did not know that it was a violation of the law to sell liquor without a Federal license. They also interposed the defense that the Government has failed in its proof in No. 74-39, the gambling charge, to show the requisite nature of the operation as a Federal violation and has failed to show the involvement of these defendants in the conduct of the operation. These are two conflicting versions of the affair. There are several issues of fact to be decided by the jury and it just simply boils down to this, which version is the correct one? Is the version advanced by the United States the correct one or the version advanced by the defendants the correct

one? So, if the jury believe from the evidence in this case beyond a reasonable doubt that from on or about the 26th day of October, 1973, and continuing until on or about the 14th day of December 1973 in Middlesboro, Bell County, in the Eastern District of Kentucky, that John Hughett, Jr., and Ward Hughett carried on the business of a retail dealer in liquors and did willfully fail to pay the special tax as required by Title 26 Section 5121A United States Code, you will find said defendants guilty of the said charge in indictment No. 74-4. Otherwise, you will find said defendants not guilty of the offense charged in indictment No. 74-4.

Similarly, if the jury believe from the evidence in this case beyond a reasonable doubt that beginning on or about the 26th day of October 1973 and continuously thereafter up to and including the 14th day of December 1973 at Middlesboro, Bell County in the Eastern District of Kentucky, John Hughett, Jr., Thomas Hughett, Selda Sue Blackburn and Bonnie Hughett, with diverse other persons to the Grand Jury unknown unlawfully, willfully and knowingly did conduct an illegal gambling business under the name of the Green Parrot, which business involved lotteries, card games, blackjack card games of poker and tip boards in which illegal gambling business had been in substantially continuous operation for a period in excess of 30 days involving five or more persons in its conduct, management and ownership, and all being in violation of the laws of the Commonwealth of Kentucky, that is, KRS 436.200, 436.230 and 436.440, then you will find the defendants John Hughett, Jr., Thomas Hughett, Selda Sue Blackburn and Bonnie Hughett guilty of the offenses charged in indictment No. 74-39. Otherwise, you will find said defendants not guilty of the charge contained in indictment No. 74-39. A unanimous verdict is required. That is to say, each juror must agree to any verdict returned by the jury. You should elect one of your number foreman. The foreman should sign the

verdict upon behalf of the jury when you have arrived at your verdict in this case. We have prepared for your use in this case two forms of verdict to be used when you have arrived at your verdict. The first one, Case No. 74-4 relates to the so-called liquor indictment and it reads as follows: United States District Court for the Eastern District of Kentucky, United States of America v. John Hughett, Jr., and Ward Hughett, London at Lexington—which means it's a London case tried on the Lexington docket of this Court—No. 74-4. We the jury find as to the defendant John Hughett, Jr., and there is a blank line. We the jury find as to the defendant Ward Hughett and there is a blank line. In the lower left hand side appears the words and figures January 1976, lower right hand side a line. Underneath that line appears the word 'Foreman'. When you have arrived at your verdict in this case, No. 74-4, that form of verdict should be filled in in accordance with the finding of the jury and signed by the Foreman of the jury and dated. It should be substantially in the following form: We the jury find as to the defendant John Hughett, Jr. guilty or not guilty. We the jury find as to the defendant Ward Hughett guilty or not guilty. This is the province of the jury. The two defendants in this case. You may find both defendants guilty. You may find both defendants not guilty or you may find one defendant guilty and the other defendant not guilty. Again, this is the province of the jury.

Likewise, in No. 74-39, the gambling indictment, there is a form of verdict which reads as follows: United States District Court for the Eastern District of Kentucky, United States of America v. John Hughett, Jr., Thomas Hughett, Selda Sue Blackburn, Bonnie Hughett, London at Lexington No. 74-39. We the jury find as to the defendant John Hughett, Jr., a blank line. We the jury find as to the defendant Thomas Hughett, a blank line. We the jury find

as to the defendant Selda Sue Blackburn, a blank line. We the jury find as to the defendant Bonnie Hughett, a blank line. On the left hand side in words and figures January 1976. Lower right hand line again appears the word 'Foreman'. When you have arrived at your verdict in No. 74-39, the gambling indictment, the form of verdict should be filled in in accordance with the finding of the jury, dated and signed by the foreman of the jury. It should read substantially as follows: We the jury find as to the defendant John Hughett, Jr., guilty or not guilty. We the jury find as to the defendant Thomas Hughett, guilty or not guilty. We the jury find as to the defendant Selda Sue Blackburn, guilty or not guilty. We the jury find as to the defendant Bonnie Hughett, guilty or not guilty. Again, this is the province of the jury. In this case there are four defendants on trial here. The verdict should reflect the finding of the jury with respect to the guilt or innocence of the four defendants, John Hughett, Jr., Thomas Hughett, Selda Sue Blackburn and Bonnie Hughett. You may find all four of them guilty, you may find all four defendants not guilty, or may find some defendant or defendants guilty and other defendant or defendants not guilty. Again, this is the province of the jury. However, the verdict returned by the jury should reflect the finding of the jury with respect to the guilt or innocence of all the defendants on trial in No. 74-39. *Are there any objections or exceptions to the charge as given?*

By Mr. Cook: No, Your Honor.

By Mr. Roberts: May I approach the Bench?

By the Court: Yes, come up.

BENCH CONFERENCE

By Mr. Roberts: I want to say that as to the liquor violation, that it boils down to just a failure to buy a license and it is highly prejudical on our clients—

By the Court: It says they knew it was against the law. Isn't that what I said?

By Mr. Roberts: Your Honor, I may have been mistaken, but I wrote down—this is the way I wrote it down. Had it been that it boils down to just a failure to buy a license I would have had no objection to it and referring to the reporter's notes, it may have been that way, but that isn't the way I understood it.

By the Court: Do you think the instructions were misleading, Mr. Crabtree, as to No. 74-4?

By Mr. Crabtree: Is he talking about the Court's comments or—

By the Court: I don't know what he is talking about.

By Mr. Roberts: There are at least two or three references in the comments and in the instructions to something in essence that five persons were for a 30 day period would —by itself doesn't get to the heart of the defense because at least one place in these instructions has properly outlined the law and the Government has agreed that not only do you need five persons for 30 days but it has to be the same five persons and from the peculiar nature of the way this evidence was presented, I think this jury may well think there are five people here and conclude during this period because they have five people that it is the same five people. If they make reference to the five people in there without an insertion in there to show that it has to be the same five persons would be prejudicial to my clients.

By the Court: Do you think it was fairly stated, Mr. Crabtree?

By Mr. Crabtree: Yes, sir. Of course, I agreed on the instructions beforehand.

By the Court: You agree it was a fair statement of what the cases hold?

By Mr. Crabtree: Yes, sir. (Emphasis added.)

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No. 76-1015

In the Supreme Court of the United States

OCTOBER TERM, 1976

JOHN HUGHETT, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 23, 1976. The petition for a writ of certiorari was filed on January 24, 1977, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court's instructions to the jury constituted plain error.

2. Whether the evidence was sufficient to sustain the convictions of petitioners Thomas Hughett and John Hughett, Jr.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner Thomas Hughett was convicted of willfully conducting an illegal gambling business, in violation of 18 U.S.C. 1955. Petitioner Ward Hughett was convicted of willful failure to pay the special tax imposed on retail liquor dealers, in violation of 26 U.S.C. 5121(2). Each was sentenced to two years' imprisonment. Petitioner John Hughett, Jr., was convicted of both of the above offenses and was sentenced to concurrent two-year prison terms on each count. The court of appeals affirmed (Pet. App. A).

The evidence at trial showed that, in the latter part of 1973, petitioners Thomas Hughett and John Hughett, Jr., conducted an illegal gambling business at a place known as the Green Parrot in Middlesboro, Kentucky. It also showed that petitioners John Hughett, Jr. and Ward Hughett made retail sales of liquor in the back room of the Green Parrot and that neither paid the special tax imposed on retail liquor dealers.

ARGUMENT

1. In its instructions to the jury concerning criminal intent, the district court stated in part (Pet. App. 25):

> As a general rule, it is reasonable to infer that a person ordinarily intends all the natural and probable consequences of acts knowingly done or knowingly omitted. So, unless the evidence in the case leads the jury to a different or contrary conclusion, the jury may draw the inference and find that the accused intended all the natural and probable consequences which one, standing in like circumstances and possessing like knowledge, should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused.

Although petitioners excepted to certain portions of the charge, they did not object to the above instruction (Pet. App. 30-31). Petitioners contended on appeal, however, that the instruction was plain error. The court of appeals, relying on earlier cases in the circuit, found that the challenged instruction should not have been given, but it concluded, in light of the instructions as a whole and the proof of guilt, that the error did not affect any substantial rights of the petitioners. Further review of this essentially factual determination is not warranted.

Contrary to petitioners' assertion (Pet. 6), there is no conflict between the decision below and decisions of the Fifth and Ninth Circuits. Although those courts have held that use of the instruction at issue here was plain error (see *Mann* v. *United States*, 319 F. 2d 404 (C.A. 5), certiorari denied, 375 U.S. 986; *Bloch* v. *United States*, 221 F. 2d 786 (C.A. 9)), those decisions were based upon their particular facts. Subsequent decisions in each circuit have upheld convictions despite use of the challenged instruction, where, as here, the charge when read as a whole and in the context of the trial clearly placed the burden of proof of criminal intent on the government. See, *e.g.*, *United States* v. *Duke*, 527 F. 2d 386, 393 (C.A. 5), certiorari denied, 426 U.S. 952; *United States* v. *Durham*, 512 F. 2d 1281, 1288-1289 (C.A. 5), certiorari denied, 423 U.S. 871; *United States* v. *Jenkins*, 442 F. 2d 429, 438 (C.A. 5); *Cohen* v. *United States*, 378 F. 2d 751, 755-756 (C.A. 9), certiorari denied. 389 U.S. 897; *Sherwin* v. *United States*, 320 F. 2d 137, 148-150 (C.A. 9), certiorari denied, 375 U.S. 964. Moreover, all three circuits are in agreement that the charge is erroneous and should not be given by the district courts in their jurisdictions. In sum, there is no conflict on this issue, and the determination whether use of the instruction in

a particular case constitutes plain or reversible error is appropriately left to the courts of appeals.[1]

2. Petitioners Thomas Hughett and John Hughett, Jr. contend (Pet. 8-10) that the evidence was insufficient to sustain their convictions under 18 U.S.C. 1955 because the involvement of five or more persons in the illegal gambling enterprise was not established. The evidence showed, however, that petitioner John Hughett, Jr. sold tip boards, assisted in operating the card games, and cut the pot on behalf of the gambling enterprise; petitioner Thomas Hughett supervised the activities in the back room (where the gambling operation was located) and was a part owner of the establishment (Tr. 665); Selda Sue Blackburn and Bonnie Hughett played "lookout" roles by operating a warning light that signalled persons in the back room in the event police entered the building (Tr. 708-710); and an unidentified male worked behind the bar and was responsible for "pushing" the tip boards. This evidence was sufficient to support the convictions. See *United States* v. *Tarter*, 522 F. 2d 520 (C.A. 6); *United States* v. *Thomas*, 508

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[1]In *United States* v. *Chiantese*, 546 F. 2d 135, the Fifth Circuit has recently ruled that use of the so-called "*Mann* instruction" henceforth will require an automatic reversal of the conviction, at least when the defendant has objected to the instruction at trial (*id.* at 136 and n. 3). However, in a case decided two days before *Chiantese*, another panel of the Fifth Circuit viewed the trial judge's overall charge to the jury, the type of case, and the nature of the evidence in concluding that use of the "*Mann* instruction" did not constitute reversible error. *United States* v. *Roberts*, 546 F. 2d 596, 598-599. The government has petitioned for rehearing, with suggestion of rehearing *en banc*, in *Chiantese* in an effort to resolve this intra-circuit conflict. In these circumstances, there is no necessity for review of the question by this Court. *Chiantese*, even if ultimately adhered to by the Fifth Circuit, does not in any event conflict with the decision below, since it requires automatic reversal only when a timely objection has been made at trial to the instruction.

F. 2d 1200 (C.A. 8), certiorari denied *sub nom. Schullo* v. *United States*, 421 U.S. 947; *United States* v. *Harris*, 460 F. 2d 1041 (C.A. 5), certiorari denied, 409 U.S. 877.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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